No. 88-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

Consolidated Rail Corporation ("Conrail") seeks reversal of the decision of the court below on the ground that the court misapplied the "arguably justified" standard that all the circuit courts of appeals have adopted in determining the existence of a major or minor dispute under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1982) ("RLA"). Rather than address the issue of whether Conrail's position that it had the right to add a drug test to the urinalysis component of its existing fitness for duty physical examinations was at least "arguable," Respondent Railway Labor Executives' Association ("RLEA" or the "Unions") has devoted most of its Brief to challenging this uniformly adopted standard. RLEA has done so despite conceding that it did not raise such a challenge in the courts below.

Conrail submits that RLEA's newly-proposed standard is contrary to the purposes of the RLA, as it would impermissibly place the federal courts in the role of prejudging many of the thousands of railway labor disputes which arise each year—a function that this Court and the lower courts have consistently held is reserved for arbitration. In contrast to RLEA's proposed standard, the "arguable" standard fosters the RLA's goal of preventing interruptions to commerce while providing an effective and efficient means for resolving disputes between rail unions and carriers.

I. RLEA SHOULD NOT BE PERMITTED TO INTRODUCE AN ENTIRELY NEW ISSUE THAT IT NEVER RAISED IN THE PROCEEDINGS BELOW OR IDENTIFIED IN ITS FORMULATION OF THE QUESTION PRESENTED.

Throughout this litigation, and indeed until the filing of RLEA's Brief, this action has involved the single question of whether Conrail's contention that it had the right to add a drug screen to the urinalysis component of its existing physical examinations raised a "minor" dispute under the RLA. There has never been any disagreement between the parties that the "arguable" standard is to be used in differentiating between "major" and "minor" disputes. In fact, RLEA candidly admits "Respondents did not challenge below the proper standard to be applied in determining whether the underlying controversy is a major or a minor dispute." (Brief for Respondents at 35 n.29).

Moreover, as recently as last July, in its Brief in Opposition to Conrail's Petition for Certiorari, RLEA advised this Court that "this litigation does not involve any novel points of law that the Court has not already addressed." In addition, RLEA urged that the "legal standards to be followed are well known and the Third

Circuit Opinion correctly discusses such legal standards." (Brief for Respondents in Opposition at 6.)[1]

In its Brief for Respondents, RLEA now seeks to challenge the very standard which it previously supported. RLEA contends for the first time that the "arguable" standard, which has been consistently applied by federal courts for 30 years, is an erroneous test for differentiating major and minor disputes under the RLA. RLEA argues instead that its independent review of the legislative history of the RLA suggests that a different standard should be applied which makes all changes by the carrier presumptively "major" disputes unless the carrier initially can demonstrate to a federal court the existence of a "clear and patent contractual right" authorizing the change. (Brief for Respondents at 36). RLEA now submits that rejection of the long-established standard and adoption of its proposed standard will better serve the objectives of the RLA.[2] RLEA takes this position notwithstanding its recent acknowledgement that the "arguable" or "not obviously insubstantial" test for determining minor disputes has been settled law for at least "the past four decades."[3]

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[1] The Third Circuit's articulation of the standard to be applied in determining minor disputes which RLEA supported was:

> [i]f the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial', the controversy is [a minor dispute] within the exclusive province of the National Railroad Adjustment Board.

(JA-120).

[2] RLEA has presented similar arguments in its Petition for Writ of Certiorari in *Railway Labor Executives' Ass'n v. Chicago & N. W. Transp. Co.*, No. 88-464, *cert. denied*, 109 S. Ct. 493 (1988).

[3] *Id.* at 19. RLEA does not appear to be contending that there exists any conflict among the circuits with respect to the proper standard to be applied by the courts in determining the existence of

RLEA should not be permitted to raise at this juncture new issues which were never argued below or even identified in RLEA's formulation of the question presented in its Brief in Opposition to the Petition for Certiorari. Supreme Court Rule 21.1(a) states that the Court will only consider the questions presented in the Petition. Rule 34.1(a) requires that briefs on the merits "may not raise additional questions or change the substance of the questions already presented" in the Petition for Certiorari. Rule 34.2 further provides that "[t]he brief filed by an appellee or respondent shall conform to the foregoing requirements." This Court has frequently stated that it will not entertain new questions or issues raised for the first time in briefs on the merits but not in the questions presented. *Dorszynski v. U.S.*, 418 U.S. 424, 431-32 n.7 (1974); *Radio Officers' Union v. NLRB*, 347 U.S. 17 n.35 (1954); *cf. Stone v. Powell*, 428 U.S. 465, 482 n.15 (1976), citing *Kaufman v. U.S.*, 394 U.S. 217, 239 n.7 (1969) (". . . only in the most exceptional cases will we consider issues not raised in the petition.").

The Court similarly restricts respondents to issues that they have raised below. *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983) (respondent did not raise an issue of unethical conduct in district court or the court of appeals and the court declined to address it); *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980) ("ordinarily we will not consider a claim that was not presented to the courts below."); *Hankerson v. North Carolina*, 432 U.S. 233, 240 n.6 (1977) ("respondent may make any argument *presented below* that supports the judgment of the lower court.") (emphasis added).[4]

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major and minor disputes under the RLA. Rather, RLEA apparently suggests that the "arguable" standard was improperly utilized by all of the circuit courts of appeals. Presumably, in RLEA's view, those decisions are erroneous as a matter of law.

[4] Although the Court in its discretion has made exceptions to the rule stated above, none of the Court's recognized exceptions exists in this case. According to Rule 34.1(a), the Court may consider an issue not raised in the Petition if such consideration is necessary to rectify a plain error made by the courts below. However, the Court has limited "plain error review" only to those circumstances where it is necessary for the purpose of correcting "obvious instances of injustice or misapplied law." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). In addition, the Court has exercised its discretion to rectify plain error upon review of federal court proceedings in exceptional circumstances where the error seriously affects the fairness, integrity or reputation of public proceedings. *Connor v. Finch*, 431 U.S. 407, 421 n.19 (1977); *Silber v. U.S.*, 370 U.S. 717, 718 (1962).

Having failed to challenge below the standard for determining major and minor disputes under the RLA, and in the absence of exceptional circumstances justifying discretionary review by this Court, consideration by the Court at this time of RLEA's proposed new standard would be unwarranted and would inject substantial confusion into a well-settled area of law.

II. RLEA'S NEWLY PROPOSED STANDARD WOULD EMBROIL THE FEDERAL COURTS IN INNUMERABLE RAIL AND AIRLINE LABOR DISPUTES AND WOULD REQUIRE THEM TO PREJUDGE ISSUES RESERVED FOR ARBITRATION.

RLEA proposes a new standard that "disputes over changes are presumptively major disputes unless the carrier can satisfy either of the two limited exceptions set forth in Section 2 Seventh of the Act." (Brief for Respondents at 12). According to RLEA, these exceptions occur (1) when the carrier has complied with the major dispute provisions found in Section 6 of the Act, 45 U.S.C. § 156; or (2) when a carrier can assert a contractual right to make the change which is "clear and patent." *Id.*

RLEA's "clear and patent" standard reflects a fundamental misconception of the limited role of the federal courts in resolving railway labor disputes and is contrary

to the underlying purposes of the RLA.[5] By contrast, the "arguable" standard, which has been adopted by all circuit courts of appeals,[6] effectuates the exclusive jurisdiction of Adjustment Boards to resolve disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153 First (i). The exclusivity of the jurisdiction of the Adjustment Boards has been repeatedly endorsed by this Court in recognition of the RLA's statutory objective to provide an effective and efficient means of resolving railroad-employee disputes and "to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and *out of the courts.*" *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) (emphasis added).

Adherence to this principle ensures that disputes between employees and carriers will be entrusted to resolution by arbitrators knowledgeable in the practices of the industry and that interruptions to commerce through union self-help will be avoided. *Gunther v. San Diego & Arizona E. Ry.*, 382 U.S. 257, 261 (1965); *Slocum v. Delaware, Lackawanna & W. R.R.*, 339 U.S. 239, 242 (1950); *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 566-67 (1946).

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[5] Conrail also strongly disagrees with RLEA's review of the legislative history of the Railway Labor Act. However, given the limitations of this Reply Brief, Conrail will not address the correctness of RLEA's historical analysis.

[6] Appendix C to the Brief for Respondents in Opposition to the petition for writ of *certiorari* in *Railway Labor Executives' Ass'n v. Chicago & N. W. Transp. Co.*, No. 88-464 at 24a, *cert. denied*, 109 S. Ct. 493 (1988), lists over 50 cases by 10 different circuits which over the last 30 years have consistently adopted the "arguable" or "not obviously insubstantial" standard.

RLEA's contention that employees are by statute accorded a perpetual and "fundamental right . . . to be consulted prior to the implementation of a decision by management adversely affecting wages or working conditions" cannot realistically be applied to every management decision. (Brief for Respondents at 13). To do so would create a concept of labor policy which is antithetical to the principle that ". . . somebody must be boss; somebody has to run the plant. People can't be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do. . . . To assure order, there is a clear procedural line drawn: the company directs and the union grieves when it objects . . . ." Goldberg, *Management's Reserved Rights: A Labor View*, in *Management Rights and the Arbitration Process—Proceedings of the Ninth Annual Meeting of the National Academy of Arbitrators*, 120-21 (J. McKelvey ed. 1956).

Application of a "clear and patent" standard would eviscerate the function of the Adjustment Boards and embroil the federal courts in innumerable rail labor disputes. This is because in every case where a carrier initiates a "clear change" in working conditions based upon a "disputed contractual right" justifying the change (Brief for Respondents at 34), the courts would be required to conduct preliminary injunction proceedings in which they would take evidence upon and interpret the parties' collective bargaining agreements and past practices[7] to determine whether the carrier had a "clear and patent" contractual right to take such action.[8]

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[7] Similarly, in reviewing claims based on past practice, RLEA would require a federal court to initially review the practice in sufficient detail to determine if it was "unequivocal; tacitly or mutually agreed upon; clearly enunciated and acted upon; and long standing as a fixed and established practice accepted by both sides without objection or repudiation." (Brief for Respondents at 43).

[8] A similar argument has been rejected under the National Labor Relations Act. In *Buffalo Forge Co. v. United Steelworkers*, 428

Thus, many of the thousands of minor disputes that arise each year in the railroad and airline industries would be transformed into presumptive major disputes that would require resolution by federal courts.[9]

A "clear and patent" standard would also severely inhibit day-to-day operations of railroads and could esca-

U.S. 397 (1976), this Court held that courts should not become involved in making contractual determinations in the context of preliminary injunction hearings because to do so would usurp the fundamental role accorded to arbitrators. Further, even a "clear" contractual basis or justification would still not serve to justify judicial intrusion into the arbitration process. Justice White, speaking for the majority in *Buffalo Forge*, stated "[t]he dissent suggests that injunctions should be authorized in cases such as this at least where the violation, in the court's view, is clear and the court is sufficiently sure that the parties seeking the injunction will win before the arbitrator. But this would still involve hearings, findings, and judicial interpretations of collective-bargaining contracts. It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly pre-empted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted." 428 U.S. at 412.

Moreover, whether or not an alleged right or violation is "clear" does not change the essential character of the dispute. "The only difference between a 'clear' violation and a 'doubtful' one is that the former makes a clear grievance and the latter a doubtful one. But both must be handled in the regular prescribed manner." *Ford Motor Co.*, 3 Lab. Arb. (BNA) 779 (1944).

[9] In its Brief in Opposition to the Petition for Writ of Certiorari in *Railway Labor Executives' Ass'n v. Chicago & N. W. Transp. Co.*, No. 88-464 at 17 n.27, *cert. denied*, 109 S. Ct. 493 (1988), the respondent pointed out that more than 5,000 minor disputes arise each year in the railroad industry alone, citing Appendix to the Budget of the United States Government, FY 1989, at I-Z66 (1988) (6,610 new railroad arbitrations commenced in 1987); Appendix to the Budget of the United States Government, FY 1988, at I-Z64-65 (1987) (5,359 new railroad arbitrations commenced in 1986); Appendix to the Budget of the United States Government, FY 1987, at I-Z80 (1986) (8,414 new railroad arbitrations commenced in 1985).

late many common labor-management disagreements into potential work stoppages. Any actions which were not clearly and expressly part of the collective bargaining agreement would be treated as major disputes. The collective bargaining agreement, as a "generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate," *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960), *quoted in Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157, 161 (1966), would have to be replaced with an extremely detailed document specifying the precise rights of the parties. Railroads would be faced with a "virtually impossible" task of including all working conditions in a collective bargaining agreement in order to avoid its actions triggering a potentially crippling major dispute. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 154 (1969). Under RLEA's scheme, it would be impossible for the carrier to predict with a reasonable degree of certainty whether it may continue to rely upon a longstanding past practice for, according to RLEA, it "is up to the party being affected by the change, and not the courts, to decide whether, in its opinion the change is so 'drastic' or 'major' that it will exercise its statutory right to bargain over that proposed change." (Brief for Respondents at 47).[10]

[10] Under RLEA's theory, those "hybrid" disputes that should be resolved by the federal courts would involve every controversy where a carrier "relies either on a written agreement or, as is more typical today, on past practice to assert that the disputed change is in the manner prescribed by the agreement." (Brief for Respondents at 36-37). Therefore, RLEA suggests that the federal courts should not surrender their jurisdiction over the dispute to the Adjustment Boards unless the carrier has demonstrated a "clear and patent contractual right to make such a change." But quite the opposite is true under the Railway Labor Act for indeed this Court has held that where a carrier seeks to effectuate a change that "put[s] in issue the meaning of the contracts that allegedly em-

III. THE "ARGUABLE" STANDARD SERVES THE RLA'S STATUTORY PURPOSES BY CHANNELING DISPUTES AND PRESERVING THE EXCLUSIVE JURISDICTION OF THE ADJUSTMENT BOARD.

Not only is the standard proposed by RLEA inflexible and unrealistic, it is contrary to the primary goal of the RLA to provide mechanisms for resolving disputes and to avoid disruptions to railroad operations. "The *first* declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.'" *Slocum v. Delaware, Lackawanna & W. R.R.*, 339 U.S. 239, 242 (1950), citing 45 U.S.C. § 151a (emphasis added). The Act itself, and the cases decided thereunder, provide that the statute's essential function is to channel disputes into resolution mechanisms which will prevent interruptions to commerce. *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711 (1945). The RLA contains "[t]he framework for fostering voluntary adjustments between the carriers and their employees in the interest of the efficient discharge by the carriers of their important functions with minimum disruption from labor strife. . . ." *International Ass'n of Machinists v. Street*, 367 U.S. 740, 755 (1961).

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bodied the working conditions which [the carrier was] about to change," it was for the Adjustment Board and not the courts to interpret the contract. *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 565 (1946). This Court noted that Congress established the Adjustment Boards to interpret labor contracts and "it also intended to leave a minimum responsibility to the courts." 326 U.S. at 566.

Indeed, the vast majority of RLA disputes involving federal court litigation are triggered by some change undertaken by the carrier. For example, virtually every case referenced in footnote 6, *supra*, in which the courts have applied the "arguable" or "not obviously insubstantial" standard involved a change of some kind and the reliance by the carrier on either a contractual term or past practice to justify that change.

The determining factor in deciding whether a minor or major dispute exists is whether the claim is premised upon existing rights or whether one party is seeking to acquire new rights. Major disputes "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past," while in minor disputes "the claim is to rights accrued, not merely to have new ones created for the future." *Elgin, Joliet & E. Ry. v. Burley, supra*, 325 U.S. at 723. The collective bargaining agreement forms the "generalized code" governing the relationship. However, all of the parties' rights and all of the conditions of employment are certainly not expressly included within the four corners of that agreement. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 155-56 (1969). Past practice or "course of dealing" is a well-accepted means of determining the scope of the parties' rights under a collective bargaining agreement. *Baker v. United Transp. Union*, 455 F.2d 149 (3d Cir. 1971); *United Transp. Union, Local Lodge No. 31 v. St. Paul Union Depot Co.*, 434 F.2d 220 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); *Rutland Ry. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

RLEA's newly proposed standard would frustrate the declared purposes of the RLA and upset a long line of decisions which have determined that the courts' statutory task is to channel, but not decide, labor disputes. "At this advanced stage of the RLA's development,"[11] the Court should not adopt a radically new standard that would inject confusion into a workable and dynamic process that has fostered labor peace for over five decades.

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[11] *Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 453 (1987).

IV. RLEA HAS FAILED TO DEMONSTRATE WHY CONRAIL'S CONTENTION THAT IT HAD THE RIGHT TO ADD A DRUG TEST WAS NOT AT LEAST "ARGUABLY" BASED ON ITS PAST PRACTICES.

As an alternative to urging the Court to adopt a new "clear and patent" standard for differentiating between major and minor disputes, RLEA attempts to support the Third Circuit's decision by asserting that Conrail's position that it had the right to initiate drug testing was not even arguable. However, RLEA disregards the uncontradicted evidence concerning Conrail's past practice and relies upon an erroneous recitation of the record.

RLEA chooses to ignore the facts of record showing Conrail's unchallenged past practices of unilaterally establishing and changing medical standards, requiring employees to pass medical examinations and determining the medical tests to be included in the physical examinations. (JA 67-71). RLEA does not dispute that Conrail has always established and frequently changed its medical standards, and that Conrail has, in the past, required that employees take and pass physical examinations. Nor does it dispute that employees have been disqualified from service for not meeting Conrail's medical standards. While recognizing, as it must, these long-standing past practices, RLEA simply dismisses their relevance by arguing that the addition of drug testing was a "change." In fact, Conrail has undertaken numerous changes in its medical examinations in the past, without objection from RLEA. These changes demonstrate, at a minimum, Conrail's "arguable" right to add a drug test as part of its fitness for duty examination.[12]

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[12] RLEA recognizes that both the Seventh and Eighth Circuits have upheld, on virtually identical facts, the carrier's "arguable" right to add a drug test. *Railway Labor Executives' Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N. R.R.*, 802 F.2d 1016 (8th Cir. 1986). Rather than attempt to distinguish those opinions, RLEA merely asserts that "the simple answer to Conrail's reliance on those cases is that those decisions were erroneous." (Brief for Respondents at 47).

The reasons advanced by RLEA in support of its contention that Conrail's position regarding the addition of the drug test was not even arguable are without merit and have no basis in the record. RLEA's argument is based upon two premises: (1) Conrail has improperly merged its fitness for duty standards with its disciplinary rules; and (2) Conrail is now attempting to "arbitrarily control off-duty, non-employment related conduct." (Brief for Respondents at 13). Neither premise is factually correct.

Contrary to the position taken by RLEA, the drug testing program implemented by Conrail is not a disciplinary device.[13] On the contrary, the program incorporates a counseling and rehabilitation service which enables employees to avail themselves of counseling and, if necessary, drug treatment. Employees are not discharged for testing positive for drugs during a physical examination but are required to submit a negative drug test within prescribed time periods under the supervision of the Medical Department. Moreover, employees found medically unfit for duty have always been subject to being removed from service without pay and have not been returned to duty until deemed fit to do so by the Medical Department. (JA-70).

RLEA also misrepresents the nature of Conrail's program when it charges that Conrail is now seeking to

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[13] In a later decision, *Transport Workers' Union, Local 234 v. Southeastern Pennsylvania Transp. Authority*, Nos. 88-1160 and 88-1206, slip op. at 28 (3d Cir., Dec. 28, 1988) (to be reported at 863 F.2d 1110), the Third Circuit compounded its prior error by erroneously describing Conrail's drug policy as "mandating discharge of employees with positive drug test results regardless of a finding of impairment."

"regulat[e] the employee's private life." (Brief for Respondents at 44). That allegation ignores the fact that the way in which an employee conducts himself or herself while off duty (*e.g.*, eating, drinking, sleeping and other habits) may affect his or her ability to conform to the employer's fitness for duty standards. In that regard, there is no difference between Conrail's medical standards for detecting drug use and its other medical standards. RLEA has clearly acquiesced in Conrail's right to base its medical fitness for duty determinations on factors that could impact on an employee's private life.[14]

Moreover, with particular reference to drug use, RLEA has previously recognized that ". . . one who is using alcohol or drugs should not be working in the railroad system." [15] RLEA has further conceded that it is reasonable to believe that one who uses drugs off the job is more likely to use drugs on the job and that the use of drugs prior to reporting to work and while on duty are "an equal concern." [16] Thus, contrary to its own assertion, RLEA has recognized that off-duty drug use may have an impact on an employee's work performance.

In light of RLEA's recognition of the dangers of drug use and the possible connection between off-duty drug use and on-the-job drug use and in view of the impact that Conrail's other medical standards may have on an employee's private life, it is not at all implausible to con-

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[14] In *Railway Labor Executives' Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 706 (7th Cir. 1987), the court rejected a similar argument by RLEA that the drug testing was a "radical departure" in policy because, in contrast to other medical examinations, it allegedly "intruded into the employees' conduct of their private lives."

[15] Transcript of oral argument by Lawrence D. Mann, Esquire, on behalf of Railway Labor Executives' Association in *Burnley v. Railway Labor Executives' Ass'n*, No. 87-1555, *cert. granted*, 108 S. Ct. 2033 (1988), at 27.

[16] *Id.* at 31-33.

clude that Conrail's longstanding right to establish fitness for duty standards, to which the Unions clearly acquiesced, included the right to add a drug screen to the urinalysis component of its physical examinations. Indeed, RLEA's attempt to alter both the standard and the facts applicable to this case apparently reflects its tacit admission that Conrail's claim of justification for the addition of the drug screen was at least "arguable."

Respectfully submitted,

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